

Nguyen (Migration) [2015] AATA 4025 (16 November 2015)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Miss Quynh Trang Nguyen
CASE NUMBER:	1504580
DIBP REFERENCE(S):	CLF2014/48370
MEMBER:	Suzanne Carlton
DATE:	16 November 2015
PLACE OF DECISION:	Adelaide
DECISION:	The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Statement made on 16 November 2015 at 4:10pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 – Not a genuine continuing relationship – Cancellation of student visa – Sponsor’s mental health and addiction – Contradictory evidence – No compelling circumstances – Decision under review affirmed

LEGISLATION

Migration Act 1958, ss 65, 5F(2)(a)-(d), 359AA

Migration Regulations 1994, Schedule 2, cl 820.211, r 1.15A(3), Criterion 3001

CASES

Babici v MIMIA (2005) 141 FCR 285

Boakye-Danquah v MIMIA (2002) 116 FCR 557

Monakova v MIMA [2006] FMCA 849

MZYPZ v MIAC [2012] FCA 478

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 16 March 2015 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 17 March 2014 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2)(a) because she was not satisfied the parties were in a genuine and continuing relationship.
4. The applicant appeared before the Tribunal on 15 October 2015 to give evidence and present arguments. The Tribunal also received oral evidence from Mr Shane Lawson, the sponsor. The Tribunal hearing was conducted with the assistance of an interpreter in the Vietnamese and English languages.
5. The applicant was represented in relation to the review by her registered migration agent.
6. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The applicant is a 24-year old Vietnamese national who first came to Australia in 2008 on a student visa. She studied and completed a Certificate IV and Diploma of Business at the South Australian Institute of Business and Technology, which is affiliated with the University of South Australia (UniSA). She was awarded her Diploma in 2010 and then continued on with towards a BA in Business studies at UniSA. However, she states that she ceased studying sometime in 2012. She has not studied since that time. She claims that she has never worked in Australia and is supported by her parents.
8. Her first student visa ended on 5 July 2012 and she was granted a subsequent student visa. It appears that the student visa was cancelled on 24 January 2014 due to the applicant no longer studying.
9. The sponsor is a 43-year-old Australian man, currently working part-time as a dog trainer. While he worked as a car detailer until 2006 or so, he has largely been reliant on Centrelink since then, with occasional part-time or casual jobs. He has not reported the relationship to Centrelink because, he says, he understood that until the applicant had a visa he was not required to do so.
10. Until the early 2000s the sponsor was in a relationship with Margaret Marks, with whom he had three children. The sponsor's sons are now 20, 17 and 12. However, it appears that the sponsor is largely estranged from them and the applicant has never met them. He is also estranged from his mother and brother, who live in Pt Lincoln.

11. The couple claim to have met in 2011 in the State library. They arranged for a date some days later. The applicant claims to have moved in with the sponsor in December 2011 and the couple married on 17 January 2014. They lodged this application on 17 March 2014.

SPOUSE/DE FACTO (cl.820.211(2)(a), (3)(e), (4)(e), (5)(e), (6)(d), cl.820.221)

Whether the parties are in a spouse or de facto relationship

12. One issue before me in the present case is whether the parties are in a genuine spousal relationship.
13. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
14. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion as to these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

Are the parties validly married?

15. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The parties have provided the Tribunal with a copy of a registered marriage certificate dated 17 January 2014. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spousal relationship met?

16. The Tribunal has had regard to the evidence provided relating to the financial aspects of the relationship, including joint ownership of assets, and joint liabilities; the extent of any pooling of financial resources, any legal obligations owed to the other party; and any sharing of day-to-day household expenses.
17. The sponsor's income is derived from Centrelink, in relation to which, he is not 'partnered' and from part-time wages of up to \$200 – 250 per week. The applicant is supported by her parents. While the parties are jointly listed on the car registration, there is little else to support that they have any financial intermingling. When asked about their expenses, both parties individually asserted that their share of the rent (in a home shared with others) is \$400 per fortnight. However, the applicant said that this included utilities and internet. The sponsor said that utilities were in addition to the rent paid and that there was no internet.
18. The contradictory responses cause me to question the parties' credibility and awareness of claimed joint financial obligations.

19. The Tribunal has had regard to the evidence provided relating to the nature of the parties' household, including any joint responsibility for the care and support of children, the parties' living arrangements; and any sharing of housework.
20. The parties claim to have lived together in a rented share house in Parafield Gardens since December 2011. They claim that they continue to do so and apart from a brief period when the applicant went to stay with her aunt in Melbourne, they have continued to live together.
21. Both parties made reference to an argument or arguments that caused the applicant to go to Melbourne, but the applicant said that she lived with her aunt in Melbourne for "a few months"; while the sponsor said that it was about a week. It was unclear whether this occurred in 2013 or 2014.
22. The Tribunal has had regard to the evidence provided relating to the social aspects of the relationship, including whether the parties represent themselves to other people as being married to each other; the opinion of friends and acquaintances about the nature of the relationship; and any basis on which the persons plan and undertake joint social activities.
23. There were two statutory declarations submitted with the application, both of which are said to have been written by people who were originally friends of the sponsor. One declarant was Ms Marks, apparently unrelated to the sponsor's previous partner. The applicant said that they meet Ms Marks for coffee and dinner occasionally, but not at her house and the applicant does not know where Ms Marks lives. The sponsor said that they go to Ms Marks' home for dinner every three months or so and that she lives near Hanson Rd.
24. The other declarant is Ms Nguyen who the applicant says they see for dinner monthly at her home near Mawson Lakes. The sponsor said that Ms Nguyen lives in or around Paralowie. I note that Paralowie and Mawson Lakes are in opposite directions from the applicant's claimed residence, but accept that Ms Nguyen may have moved from one suburb to the other and that this might explain this confusion.
25. Both parties have said that the applicant has never met the sponsor's family. In relation to the applicant's family, her parents and sister live in Vietnam and she has aunt who lives in Melbourne. The applicant's evidence was that her aunt and the sponsor had never met due to her aunt's poor English. The sponsor stated that he had met the applicant's aunt in Melbourne.
26. With respect to the applicant's family in Vietnam, both parties stated that they had video calls to her family on the weekends. The sponsor stated that the applicant's family had never visited Australia. The applicant said that her mother and sister had visited, but at the time the applicant was upset with the sponsor and did not want to introduce them. Instead, the applicant went by herself to Melbourne to visit them. When asked, the sponsor indicated that if the applicant's family had travelled from Vietnam to Australia, he would have been aware of the visit even if he did not meet them.
27. The Tribunal has had regard to the evidence provided relating to the nature of persons' commitment to each other, including the duration of the relationship; the length of time they have lived together; the degree of companionship and emotional support they draw from each other; and whether they see the relationship as long-term.
28. The parties had differing accounts of their first date. The applicant said that she was then living with a friend, who she lived with only a few months, she could not recall where that was. According to her, the sponsor picked her up from that place in his car and they went out to coffee at the Mawson Lakes café. The sponsor said their first date was at the Palace in Semaphore, a bar and nightclub. He said they met there and he does not know where the

applicant was then living. Both agreed that the applicant moved in to his home a few months later. In post-hearing submissions, the applicant asserted the confusion was due to the sponsor's poor memory and that their second date was at the Palace in Semaphore.

29. The applicant was able to name and give the ages for the sponsor's three sons, but knew little about them. She did not know the name of the boys' mother or when or why that relationship ended.
30. She said that she stopped studying in 2012 because she was depressed but acknowledged that she had never received any treatment for that or a medical diagnosis of that.
31. She said that the sponsor had also been depressed since the problems with her visa began and that he had tried to commit suicide. She also said that she had been assisting him through a methadone program to address his past drug addiction, but that he stopped the methadone program a few months ago.
32. The sponsor gave evidence that he is still on the methadone program and has been since 2012.
33. On the whole, I found both parties to be evasive and not forthcoming with their answers. I have doubts about their credibility.

34. **Adverse information – section 359AA**

35. I put adverse information to the applicant pursuant to s359AA of the Act for her comment. One piece of information was that the applicant had completed a landing card in 2013, on her return from Vietnam, providing as her intended address and contact details the residential address of her aunt in Melbourne. She provided as an emergency contact the name and phone number of a friend in Melbourne.
36. During the hearing, the applicant had earlier given evidence that while she had briefly lived with her aunt before she went to Vietnam, she was returning to her then de facto relationship with the sponsor upon her return to Australia.
37. The applicant and her representative asked for further time to comment on this issue and that request was granted.
38. In post-hearing submissions, the applicant said that she gave the name of that friend in Melbourne because that friend speaks both English and Vietnamese and could communicate with the applicant's aunt in Melbourne if necessary in the case of an emergency. With respect to the address provided, she said that she gave her aunt's address because she was visiting her aunt first before returning home to Adelaide.
39. The second piece of adverse information I put to her for comment was an internal note about her in-person attendance at the Department of Immigration on 23 January 2014, during which she completed a change of address form. The internal note said that the immigration officer looked up the applicant's visa details and noted that there was no current enrolment for her. The note further indicated that the applicant was counselled as to impending visa cancellation as she was not studying.
40. The applicant had said earlier in the hearing that the first she knew of the invalidity of her student visa was when her representative advised her of it after she lodged this visa application in March 2014.

41. In response to the information put, the applicant asserts that she was told by the officer in Melbourne that she needed to enrol in a course of study but nothing was said about cancellation. She said that she then did enrol in a short-course, but no documentary evidence of this was provided.
42. In post-hearing submissions, she reiterated that she had troubles with her studies commencing in 2011 and provided a "record of Study" from University of South Australian showing that she had last studied there in 2011, passing only three of her seven courses.
43. Having considered all of the evidence, including the post-hearing submissions and notwithstanding the additional evidence and explanations that the sponsor has a poor memory, I find that there remain significant inconsistencies in the parties' evidence. Many of these inconsistencies are of such a fundamental nature as to lead the Tribunal to conclude that the parties are not in a genuine and continuing relationship.
44. Therefore the applicant does not meet cl.820.211(2)(a) or cl.820.221. No evidence has been presented to indicate that she meets any of the alternative criteria in clauses 820.211(7), 820.211(8), 820.211(9), 820.221(2), 820.221(3).

SCHEDULE 3 CRITERIA (cl.820.211(2)(d))

Does the applicant meet Schedule 3 criteria, or should those criteria be waived?

45. An applicant who is not the holder of a substantive visa at the time of application must meet certain criteria in Schedule 3 to the Regulations. With limited exceptions not relevant to this case, he or she must satisfy Schedule 3 criteria 3001, 3003, and 3004 unless the Minister is satisfied that there are compelling reasons for not applying those criteria: cl.820.211(2)(d).
46. It is not in dispute that the applicant in the present case did not have a substantive visa at the time of application. As the applicant did not enter Australia as the holder of a Subclass 995 visa or special purpose visa, the issue in the present case is whether the applicant satisfies the Schedule 3 criteria unless there are compelling reasons for not applying those criteria. These criteria are set out in the attachment to this decision.

Criterion 3001

47. In order to satisfy criterion 3001, the application for the visa must have been lodged within 28 days of the relevant day. The 'relevant day' is defined in 3001(2), as set out in the attachment to this decision.
48. The relevant day, in this matter, was 24 January 2014, the last day on which she held a student visa.
49. As the visa application was not made within 28 days of the relevant day, the applicant does not satisfy criterion 3001.
50. As these criteria are cumulative, I have not gone on to consider the remaining criteria.

Compelling reasons

51. As the Tribunal has found that the applicant does not meet the relevant Schedule 3 criteria, it is required to consider whether there are compelling reasons for not applying the criteria.
52. The expression 'compelling reasons' is not defined for these purposes. However, the reasons should be sufficiently convincing to move the decision-maker to exercise its

discretion to waive the requisite criteria and the circumstances must be sufficiently powerful to lead a decision-maker to make a positive finding in favour of waiving the required criteria: *MZYPZ v MIAC* [2012] FCA 478 at [10]; *Babicci v MIMIA* (2005) 141 FCR 285 at [24]. The compelling reasons for not applying the Schedule 3 criteria must be reasons which are relevant to the purpose of permitting the person to make an application for a spouse visa in Australia: *Monakova v MIMA* [2006] FMCA 849 at [27]-[28]. The question of whether there are compelling reasons for not applying the Schedule 3 criteria must be considered in relation to circumstances existing at the time of application: *Boakye-Danquah v MIMIA* (2002) 116 FCR 557 at [39].

53. The applicant has asserted that no one advised her of the visa cancellation on 23 January 2014 and that she received no cancellation notice. When asked why she thought she still had a valid student visa despite not studying for almost two years, she unable to adequately explain.
54. I note that the conditions on her most recent student visa included maintain attendance and enrolment and to advise of any changes of address and the violation of either criteria would have justifiably led to the cancellation of the visa. There is evidence before me that the applicant was not in compliance with her student visa conditions as early as 2012. I do not accept as a compelling reason that she was unaware of the visa's cancellation.
55. Further compelling reasons claimed included the mental health of both parties. The applicant has said that she suffered from depression but provided no supporting or objective evidence of this. The sponsor is said to be a recovering drug addict and is reliant on the sponsor's support in relation to the methadone program. However, as the applicant was unaware that he is still undertaking the methadone program, I am not satisfied of the integral role she plays in his recovery.
56. The parties provided emergency room discharge papers indicating that the sponsor had attempted suicide and the parties sought to link the suicide attempt to the applicant's visa problems.
57. The parties were given further time to provide supporting medical evidence. Evidence provided indicates that consistent with the sponsor's evidence, he is still on a methadone program and doing well. The medical report also repeats the sponsor's assertions that he believes his relationship with the applicant is 'paramount' in his ongoing recovery and makes reference to wanting to start a family.
58. Having considered the further medical evidence and the evidence of the parties, the Tribunal is not satisfied that there are compelling reasons to justify the waiver of the Schedule 3 criteria.
59. Accordingly, the applicant does not meet cl.820.211(2)(d)(ii). There is no evidence before the Tribunal that the applicant meets the alternative criteria in clauses 820.211(3) – (9).
60. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

61. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Suzanne Carlton
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).

Schedule 3

3001

- (1) The application is validly made within 28 days after the relevant day (within the meaning of subclause (2)).
- (2) For the purposes of subclause (1) and of clause 3002, the relevant day, in relation to an applicant, is:
 - (a) if the applicant held an entry permit that was valid up to and including 31 August 1994 but has not subsequently been the holder of a substantive visa — 1 September 1994; or
 - (b) if the applicant became an illegal entrant before 1 September 1994 (whether or not clause 6002 in Schedule 6 of the Migration (1993) Regulations applied or section 195 of the Act applies) and has not, at any time on or after 1 September 1994, been the holder of a substantive visa — the day when the applicant last became an illegal entrant; or
 - (c) if the applicant:
 - (i) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or
 - (ii) entered Australia unlawfully on or after 1 September 1994; whichever is the later of:
 - (iii) the last day when the applicant held a substantive or criminal justice visa; or
 - (iv) the day when the applicant last entered Australia unlawfully; or
 - (d) if the last substantive visa held by the applicant was cancelled, and the Tribunal has made a decision to set aside and substitute the cancellation decision or the Minister's decision not to revoke the cancellation — the later of:
 - (i) the day when that last substantive visa ceased to be in effect; and
 - (ii) the day when the applicant is taken, under sections 368C, 368D and 379C of the Act, to have been notified of the Tribunal's decision.

3003

If:

- (a) the applicant has not, on or after 1 September 1994, been the holder of a substantive visa; and
- (b) on 31 August 1994, the applicant was either:
 - (i) an illegal entrant; or
 - (ii) the holder of an entry permit that was not valid beyond 31 August 1994;

the Minister is satisfied that:

- (c) the applicant last became an illegal entrant, or, in the case of a person referred to in subparagraph (b)(ii), last became a person in Australia without a substantive visa, because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with the conditions that apply or applied to:
 - (i) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (ii) any subsequent bridging visa; and
- (f) the applicant would have been entitled to be granted an entry permit equivalent to a visa of the class applied for if the applicant had applied for the entry permit immediately before last becoming an illegal entrant or, in the case of a person referred to in subparagraph (b)(ii), if the applicant had applied for the entry permit on 31 August 1994; and
- (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
- (h) the last entry permit (if any) held by the applicant was not granted subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.

3004

If the applicant:

- (a) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or
- (b) entered Australia unlawfully on or after 1 September 1994 and has not subsequently been granted a substantive visa;

the Minister is satisfied that:

- (c) the applicant is not the holder of a substantive visa because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with:
 - (i) the conditions that apply or applied to:
 - (A) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (B) any subsequent bridging visa; or
 - (ii) the conditions that apply or applied to:
 - (A) the last of any substantive visas held by the applicant (other than a condition of which the applicant was in breach solely because the visa ceased to be in effect); and
 - (B) any subsequent bridging visa; and
- (f) either:
 - (i) in the case of an applicant referred to in paragraph (a) — the applicant would have been entitled to be granted a visa of the class applied for if the applicant had applied for the visa on the day when the applicant last held a substantive or criminal justice visa; or
 - (ii) in the case of an applicant referred to in paragraph (b) — the applicant would have satisfied the criteria (other than any Schedule 3 criteria) for the grant of a visa of the class applied for on the day when the applicant last entered Australia unlawfully; and
 - (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
 - (h) if the last visa (if any) held by the applicant was a transitional (temporary) visa, that visa was not subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.